IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

PAUL BRUEGGEMANN, Appellant, v. FLOYD HODGES, Respondent.	)	No. 62677-9-I UNPUBLISHED OPINION FILED: May 17, 2010

Schindler, J. —Paul W. Brueggemann appeals dismissal of his lawsuit against Floyd E. Hodges for failure to state a claim upon which relief can be granted. Because the allegations in the complaint state a cause of action for fraudulent alteration of a promissory note, usury, and breach of fiduciary duty, we reverse the order granting the motion to dismiss the lawsuit with prejudice and the judgment awarding attorney fees, and remand.

FACTS

Paul W. Brueggemann borrowed $10,000 from Floyd E. Hodges. On November 28, 2005, Brueggemann executed a deed of trust on his condominium unit in Kirkland, as security for the $10,000 loan. Brueggemann signed a promissory note dated November 30, 2005, promising to repay Hodges $10,000 on February 28, 2006

with interest at an annual rate of eight percent.

The printed terms of the promissory note state that "[i]f any interest shall remain unpaid after due, this note shall become due and payable at once without further notice, at the option of the holder thereof." The note also states that "if this note shall be placed in the hands of an attorney for collection or if suit shall be brought to collect any of the principal or interest of this note, I promise to pay reasonable attorney fees."

The printed terms of the promissory note further provide that the note shall "bear interest at the rate of TEN percent per annum after maturity or after failure to pay any interest payment." However, there is a handwritten notation with the initials "FEH" that states interest is "to be paid monthly." The printed interest default rate of "TEN percent per annum" is also crossed out and a handwritten 18 percent rate is written in.[1] According to Brueggemann, the promissory note he signed only contained the printed terms and he did not agree to the handwritten changes made by Hodges.

The deed of trust was recorded on December 8, 2005. The deed of trust names Hodges as the beneficiary and names Title Company of Washington as the trustee. The deed of trust states that if Brueggemann defaults on the promissory note, the trustee may pursue nonjudicial foreclosure. The deed of trust also states that Hodges may later appoint a successor trustee "vested with the same powers, rights, duties and authority of the Trustee with the same effect as if originally made Trustee hereunder." In addition, the deed of trust provides that in the event of default on the loan, Hodges is "entitled to collect all reasonable attorney fees and costs

[1] Hodges' printed address on the note is also changed in handwriting.

actually incurred by you in proceeding to foreclosure."

There is no dispute that Brueggemann made no payments on the note. On February 28, 2007, Hodges appointed his attorney Romero Park & Wiggins P.S. (RPW) as the successor trustee for the deed of trust.

On March 28, acting as the attorney for the beneficiary of the deed of trust, RPW served Brueggemann with a notice of default. The notice states Brueggemann is in default for the principal amount of $10,000, "Due on February 28, 2006," and "Default Interest" of $1,938.08, based on an annual rate of 18 percent, from "February 28, 2006 Through March 28, 2007."

Acting as the successor-trustee on the deed of trust, RPW served Brueggemann on June 12 with a notice of foreclosure and sale. The notice states that Brueggemann is in default for $10,000 in principal, $2,810.96 in "Interest through September 21, 2007," based on an annual rate of 18 percent, and $2,663.21 in costs.

Representing himself pro se, Brueggemann filed a complaint for damages against Hodges and sought an injunction to restrain the foreclosure sale. Brueggemann alleged that because the promissory note was fraudulently altered, it was unenforceable. In the alternative, Brueggemann alleged that the 18 percent interest rate on the note was usurious. Brueggemann served RPW with the summons and complaint.

Hodges filed a notice of appearance. Hodges asserted that, because he was not personally served, service of the summons and complaint was insufficient under CR 4.

On September 17, Brueggemann filed a motion for default and an ex parte order to restrain the nonjudicial foreclosure sale. The court denied the motion and the request to restrain the foreclosure sale. Brueggemann's condominium sold at auction on September 21.

Brueggemann filed an amended complaint, alleging RPW breached a fiduciary duty by acting as the trustee for the deed of trust and acting as the attorney for Hodges. Brueggemann also sought additional damages resulting from of the nonjudicial foreclosure sale.

On October 10, Brueggemann filed a motion to name RPW as a defendant in the lawsuit. Hodges argued that RPW should not be named as a defendant because service of process was "directed to Floyd Hodges alone." The court denied the motion.

On January 17, 2008, Hodges filed a motion to dismiss the lawsuit for failure to state a claim upon which relief can be granted under CR 12(b)(6). Hodges argued that even if the allegations that he fraudulently altered the promissory note were true, Brueggemann was not entitled to relief because he was in default on the promissory note and foreclosure was warranted. Hodges also argued that the court should grant the motion to dismiss because he was not personally served with the summons and complaint. Brueggemann did not file a response.

On February 15, the court dismissed Brueggemann's lawsuit against Hodges with prejudice. The order states in pertinent part:

> IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss is GRANTED. Plaintiff's claims are dismissed with prejudice. Defendant may file a motion seeking an award of

> attorney's fees and costs within 10 days. Other than that motion, this matter is terminated.

On February 22, Hodges filed a motion requesting an award of attorney fees and costs. The court granted the motion and entered a judgment against Brueggemann awarding Hodges $8,308.00 in attorney fees and $413.90 in costs. On April 1, Brueggemann sent a letter asking the court to vacate the judgment.[2] The court denied the motion.

Brueggemann appeals the decision to dismiss his lawsuit with prejudice and denial of his motion to vacate the judgment.

ANALYSIS

Brueggemann contends the trial court erred in dismissing the lawsuit with prejudice under CR 12(b)(6) because the allegations in the complaint state a cause of action against Hodges for fraudulently altering the promissory note or, in the alternative, for usury. Brueggemann also argues that the amended complaint states a cause of action against RPW for breach of fiduciary duty for acting as trustee for the deed of trust and acting as the attorney for Hodges. Hodges argues that the court did not err in dismissing the lawsuit with prejudice because Brueggemann made no payments on the note. Hodges also argues that dismissal was proper because of insufficient service of process.

Under CR 12(b)(6), a complaint can be dismissed for "failure to state a claim upon which relief can be granted." Whether such a dismissal is appropriate is a

[2] Brueggemann said that he was recently incarcerated and first learned about the motion to dismiss and the judgment when Hodges tried to collect. In response, Hodges and RPW filed declarations denying knowledge of Brueggemann's incarceration.

question of law that we review de novo. Tenore v. AT & T Wireless Servs., 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998).

Dismissal under CR 12(b)(6) is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." Corrigal v. Ball & Dodd Funeral Home, Inc., 89 Wn.2d 959, 961, 577 P.2d 580 (1978). The factual allegations of the complaint must be accepted as true and a court may consider hypothetical facts not included in the record. Tenore, 136 Wn.2d at 330. A CR 12(b)(6) motion should be granted "sparingly and with care" and "'only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'" Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988) (quoting 5C Wright & A. Miller, Federal Practice § 1357 at 604). Any hypothetical factual scenario that supports the plaintiff's claim, even if asserted for the first time on appeal, is sufficient to defeat a CR 12(b)(6) motion. Bravo v. Dolsen Cos., 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

Fraudulent Alteration

RCW 62A.3-407 governs alteration of a negotiable instrument such as a promissory note. RCW 62A.3-407(a) defines "[a]lteration" as "(i) an unauthorized change in an instrument that purports to modify in any respect the obligation of a party, or (ii) an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party."

Under RCW 62A.3-407(b), if a negotiable instrument is fraudulently altered, the

affected party's obligations under the instrument are discharged. RCW 62A.3-407(b) provides in pertinent part:

> Except as provided in subsection (c), an alteration fraudulently made discharges a party whose obligation is affected by the alteration unless that party assents or is precluded from asserting the alteration. No other alteration discharges a party, and the instrument may be enforced according to its original terms.[3]

In order to discharge a party's obligations, alterations of a promissory note must be (1) material, and (2) fraudulent. Thomas v. Osborn, 13 Wn. App. 371, 375, 536 P.2d 8 (1975). Here, the allegations in the complaint state a cause of action against Hodges for fraudulent and material alteration of the promissory note. Thomas, 13 Wn. App. at 375-76 ("any change in the contract of a party, however slight, is a material alteration. . . .").

Usurious Interest Rate

The complaint also states a claim for relief based on the allegation that the 18 percent default interest rate on the promissory note is usurious.

Under RCW 19.52.020(1), the rate of interest on a loan cannot exceed 12 percent.[4] The party asserting usury must prove the following by a preponderance of evidence that:

> (1) a loan or forbearance, express or implied; (2) money or its equivalent constituting the subject matter of the loan or forbearance; (3) and understanding between the parties that the principal shall be repayable absolutely; (4) the exaction of

[3] RCW 62A.3-407(c) provides that "[a] payor bank or drawee paying a fraudulently altered instrument or a person taking it for value, in good faith and without notice of the alteration, may enforce rights with respect to the instrument (i) according to its original terms, or (ii) in the case of an incomplete instrument altered by unauthorized completion, according to its terms as completed."

[4] A loan interest rate higher than 12 percent is allowed when the Federal Reserve discount rate is higher than 8 percent. RCW 19.52.020(1)(b).

> something in excess of what is allowed by law for the use of the money loaned or for the benefit of the forbearance; and, in some jurisdictions, (5) an intent to exact more than the legal maximum for the loan or forbearance.

Hansen v. Doerflein, 52 Wn. App. 75, 78, 757 P.2d 997 (1988).

A loan is usurious when each of the five elements appears on the face of the loan contract. Stevens v. Sec. Pac. Mortgage Corp., 53 Wn. App. 507, 514, 768 P.2d 1007 (1989).[5] Here, the complaint alleges facts that if proved establish that using an interest rate of 18 percent in the event of default on the promissory note is usurious.

Breach of Fiduciary Duty

The complaint as amended also asserts a claim for relief against RPW for an alleged breach of a fiduciary duty related to the nonjudicial foreclosure of Brueggemann's condominium.

A trustee on a deed of trust acts as a fiduciary for both the debtor and the creditor. Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank, 80 Wn. App. 655, 665, 910 P.2d 1308 (1996) (citing Cox v. Helenius, 103 Wn.2d 383, 389, 693 P.2d 683 (1985)). One objective of the deed of trust act is to "provide an adequate opportunity for interested parties to prevent wrongful foreclosure." Cox, 103 Wn.2d at 387. "Because a deed of trust foreclosure is a nonjudicial proceeding, the trustee's fiduciary duty to the debtor is 'exceedingly high.'" Meyers Way, 80 Wn. App. at 665-66 (quoting Cox, 103 Wn.2d at 388-89). The trustee's duty to the debtor does not necessarily preclude the trustee from also serving as the creditor's attorney. Meyers

[5] If a loan is for a business purpose, RCW 19.52.080 provides a defense to a claim of usury. However, the burden is on the lender to show that the business purpose exemption applies. Stevens, 53 Wn. App. at 515.

Way, 80 Wn. App. at 666. However, if an actual conflict of interest with the debtor results from the creditor's attorney serving as trustee, the attorney cannot continue serving as the trustee. Meyers Way, 80 Wn. App. at 666 (citing Cox, 103 Wn.2d at 390).

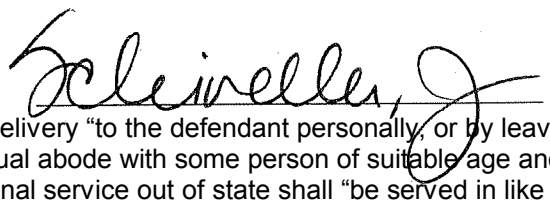
Here there is no dispute that Brueggemann is the debtor and Hodges is the creditor and that RPW served as the trustee on the deed of trust while also defending Hodges on the claim that the foreclosure was wrongful.

Although the trial court denied Brueggemann's motion to amend the complaint to name RPW as a defendant, because he states a cause of action against RPW for breach of fiduciary duty, on remand he can renew his motion to name RPW as a defendant.

Service of Process on Hodges

It appears from the record that Brueggemann did not properly serve Hodges with the summons and complaint.[6] However, because it does not appear that the statute of limitations has run, Hodges was not entitled to dismissal with prejudice based on insufficient service of process. Collins v. Lomas & Nettleton Co., 29 Wn. App. 415, 418, 628 P.2d 855 (1981).

In sum, because the trial court erred in dismissing Brueggemann's complaint with prejudice, we reverse the dismissal of his complaint with prejudice and the judgment awarding attorney fees, and remand.



[6] See RCW 4.28.080(15) (requiring delivery "to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein"); RCW 4.28.180 (personal service out of state shall "be served in like manner as personal summons within the state . . . .").

WE CONCU

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Spearman, J. Becker, J.